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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHARLES JOHNSON, Plaintiff and Appellant, v. SUN WEST MORTGAGE COMPANY, INC., et al., Defendants and Respondents.	B283262 (Los Angeles County Super. Ct. No. BC541571)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Giskan Solotaroff Anderson & Stewart, Catherine E. Anderson; Garrell Law, Peter E. Garrell, and John M. Kennedy for Plaintiff and Appellant.

Early Sullivan Wright Gizer & McRae, Scott E. Gizer, and Diane M. Luczon for Defendant and Appellant Sun West Mortgage Company.

Davis Wright Tremaine, Joseph E. Addiego III, Jennifer L. Brockett, and James G. Parker for Defendant and Respondent Proctor Financial.

Charles Johnson appeals from a judgment entered after an order granting motions for summary judgment brought by Sun West Mortgage Company and Proctor Financial. Johnson acquired a reverse mortgage from Sun West. After failing to maintain insurance required by the deed of trust that secured his reverse mortgage, Sun West acquired and placed a lender-placed insurance policy on the property. Sun West acquired the policy through Proctor, the insurance company's agent. In his complaint, Johnson alleged that Sun West and Proctor had conspired to vastly overcharge him and other reverse mortgage customers. At the hearing on Sun West's and Proctor's motions for summary judgment, the trial court excluded Johnson's expert witness's declaration and granted the motions for summary judgment. We find that the trial court did not abuse its discretion when it excluded Johnson's expert witness's declaration, and we affirm the trial court's judgment.

BACKGROUND

A. Factual Background

Charles Johnson purchased his home on West 64th Street in Los Angeles in 1963. In July 2008, Johnson obtained a reverse mortgage secured by a deed of trust on his home.[1] At his deposition, Johnson testified that he did not sign the deed of

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[1] Johnson obtained his reverse mortgage from Pacific Reverse Mortgage, Inc. DBA Financial Heritage. Financial Heritage transferred the reverse mortgage to Sun West the same month it closed.

trust. He concedes here, however, that he "received the benefit of the reverse mortgage."

The deed of trust securing Johnson's reverse mortgage contained the following provisions:

"**3. Fire, Flood and Other Hazard Insurance.** Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire. This insurance shall be maintained in the amounts, to the extent and for the periods required by the Lender or the Secretary of Housing and Urban Development. ("Secretary"). Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods to the extent required by the Secretary. . . . [¶] . . . [¶]

"**5. Charges to Borrower and Protection of Lender's Rights in the Property.** . . . [¶] . . . If Borrower fails to make these payments or the property charges required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2."

Johnson testified that he understood beginning in 1963 that he was required to maintain flood insurance for his home and had always done so. Johnson testified that during his discussions with the agent who sold him his reverse mortgage,

however, the agent told Johnson he did not need flood insurance. Johnson let his flood policy lapse in February 2009.

In January 2011, Sun West and Proctor contracted for Proctor to provide Sun West's force-placed or lender-placed insurance, tracking for flood and hazard insurance coverage compliance, and loan servicing for Sun West's reverse mortgage borrowers. Pursuant to the terms of their agreement, Proctor provided a variety of what the parties termed "Outsourcing Service Deliverables" and "Lender-Placed Service Deliverables" in exchange for Sun West "obtain[ing] all of [Sun West]'s requirements for Lender-Placed Insurance on all of its residential and commercial mortgages requiring such coverage exclusively from [Proctor]" and what the parties termed a "tracking fee" of $0.10 per loan per month. Proctor also received commissions—included in the premium—based on the premiums of the policies it placed on Sun West's customers' properties.

After Sun West contracted with Proctor, Proctor audited Sun West's reverse mortgage loan files, including Johnson's. As part of that audit, Proctor and Sun West discovered that Johnson did not have flood insurance as his deed of trust required. Proctor, on Sun West's behalf, went through the process of having flood insurance placed on Johnson's home pursuant to the deed of trust.[2] Sun West was charged—and advanced on Johnson's behalf—$2,687.44 for a premium on a policy with coverage of $247,060 for each of 2012 and 2013.

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[2] The process involved Proctor sending a series of letters to Johnson on Sun West's behalf asking for proof of flood insurance and informing him that Sun West would obtain the insurance if he did not. Johnson contends he never received the letters. Johnson does not contest, however, that Sun West was entitled to obtain flood insurance on his home.

At his deposition, Johnson testified that he received a call from a Sun West employee in 2012 or 2013 informing him he needed to obtain flood insurance. In 2013, Johnson obtained flood insurance with a coverage limit of $237,000; he paid a $247 premium. After Johnson obtained flood insurance and provided proof to Sun West, Sun West reimbursed Johnson $1,951.08 for the unused portion of his 2013 lender-placed flood insurance policy.[3]

B. Procedural Background

Johnson filed his original complaint on April 3, 2014. Between April 2014 and August 2015, Johnson filed two amended complaints.[4] Johnson's second amended complaint alleged seven causes of action: (1) breach of contract against Sun West, (2) breach of the implied covenant of good faith and fair dealing against Sun West, (3) unjust enrichment against Sun West, (4) financial elder abuse against Sun West and Proctor, (5) violation of the unfair competition law against Sun West and Proctor, (6)

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[3] The three transactions—two premiums and a premium reimbursement—were charged to Johnson's Sun West reverse mortgage account. In 2014, Johnson entered into a repayment plan to pay the premiums Sun West had advanced minus the amount Sun West "reimbursed" for the unused portion of the 2013 premium.

[4] The action is pled on behalf of a nationwide class, but Johnson never moved the trial court to certify a class. The motions for summary judgment and the judgment, therefore, are against Johnson's individual claims.

unjust enrichment against Proctor, and (7) tortious interference with a business relationship against Proctor.[5]

The crux of Johnson's complaint against Sun West and Proctor is that the two entities conspired to maximize their own profits by placing unconscionably overpriced insurance policies on properties and charging the premiums back to those customers. Johnson alleged (and argues) that the premiums must necessarily be inflated because they must include the price of the services Proctor provides for Sun West that Johnson argues cannot possibly be covered by the per-loan contracted amount Sun West pays Johnson for tracking services. Johnson's argument here is that the amount Sun West charged him for flood insurance it placed on his property was not "necessary to protect the value of the [p]roperty" and Sun West's interest in the property because it included the cost of other services Proctor was providing Sun West.

On June 30, 2016, Sun West and Proctor filed motions for summary adjudication or summary judgment on the second amended complaint. Sun West's and Proctor's motions for summary judgment raised a number of challenges to Johnson's complaint. Sun West challenged the breach of contract and breach of the implied covenant of good faith and fair dealing causes of action on the ground that Johnson denied having signed the deed of trust. According to Sun West, Johnson could not enforce obligations arising from a contract he claims he never signed; Proctor argues the tortious interference with contractual

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[5] Despite being pled in the second amended complaint against both Sun West and Proctor, the parties appear to agree that the fourth cause of action for financial elder abuse was pled only against Sun West.

relations cause of action fails for the same reason. The unjust enrichment cause of action fails, Sun West and Proctor contend, because there is no cause of action for unjust enrichment in California. Sun West challenged the elder abuse cause of action, arguing it did not unlawfully take Johnson's property for a wrongful use or with intent to defraud him. Sun West and Proctor contend that their actions regarding Johnson's property were neither unlawful nor unfair, and thus do not support a cause of action for violations of the unfair competition law. Proctor also challenges Johnson's unfair competition law claim based on its lack of any relationship to Johnson, the fact that Johnson paid no money to Proctor, and the fact that Proctor was not a party to the deed of trust.

The primary focus of the motions, however, was that the price Sun West charged Johnson, which was the same price Sun West paid for the insurance it placed on Johnson's property, was not unconscionable, was not unreasonable, was the product of a competitive arms-length bidding and negotiation process that led to the Sun West-Proctor agreement, and that Johnson could offer no evidence to the contrary. In response to the motions for summary judgment Johnson filed a declaration from Birny Birnbaum, his expert witness, that purported to offer evidence supporting Johnson's theories, including the opinion that Sun West's charges to Johnson (and class members) "include amounts unrelated to protecting properties serving as collateral for mortgage loans and, consequently, were unreasonable and excessive."

The trial court heard Sun West's and Proctor's motions on March 2, 2017. At the hearing, the trial court sustained objections to and excluded the Birnbaum declaration. The trial

court granted Sun West's and Proctor's motions for summary judgment. On May 2, 2017, the trial court entered judgment for Sun West and Proctor. Johnson filed a timely notice of appeal.

DISCUSSION

A. Applicable Law

"Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation.] As applicable here, moving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot be separately established . . . .' [Citations.] Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. [Citation.]

"On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. . . .' [Citation.] Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253.) "We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ' "specific facts," ' and cannot rely upon the allegations of the pleadings." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

"Except to the extent the trial court bases its ruling on a conclusion of law (which we review de novo), we review its ruling excluding or admitting expert testimony for abuse of discretion. [Citations.] A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*).)

B. Sun West and Proctor shifted the summary judgment burden to Johnson

Although it is not one of the contentions raised in his opening brief, Johnson stated at argument that Sun West and Proctor never shifted the summary judgment burden to Johnson to show the existence of a triable issue of material fact. We disagree.

Johnson's complaint and his expert witness's declaration, which we discuss below, were based on his contention (and his expert witness's opinion) that the price of the insurance Sun West placed on Johnson's property and then charged him for was unreasonable. Instead, on appeal Johnson argues that under the deed of trust the amount Sun West charged Johnson for insurance included amounts not "necessary" to secure Sun West's interest in Johnson's property.

Johnson supported his theory by pointing out that the insurance he secured for his own property cost a small fraction of the price Sun West charged him for the insurance it placed on his property after Johnson's flood insurance lapsed. Among other bad acts Johnson alleged was that Sun West had engineered their profit at his expense by "failing to seek competitive bids [for lender-placed insurance] on the open market."

At the summary judgment hearing, the trial court gave a relatively detailed recitation of the "uncontested factual differences" between lender-placed insurance and borrower-secured insurance Sun West and Proctor's evidence initially established:

> (1) Lender-placed insurance can be retroactive, so it can be used to insure the lender's interest in a property for which the borrower failed to maintain the required insurance even for events that happened between the lapse in the borrower's insurance and the lender securing the lender-placed insurance policy.
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> (2) The insurance company does not have access to information about the insured location when it issues the policy.
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> (3) The lender is not able to secure insurance in the homeowner insurance market.

Proctor and Sun West also produced evidence establishing that the Sun West-Proctor agreement was the product of a competitive bidding process and that Proctor was the low bidder in that process, contrary to the allegations in Johnson's complaint. The trial court summarized: Sun West "took competitive bids in a competitive market. They selected the lowest one. There is no evidence of any available lower rate in this market." And Sun West charged Johnson exactly what Sun West paid Proctor for the insurance it placed on Johnson's property.

The evidence Sun West and Proctor produced, then, demonstrated that the price of the insurance Sun West placed on Johnson's home was *not* unreasonable. The evidence also demonstrated that Johnson's failure to maintain flood insurance

on his home made it necessary for Sun West to incur the cost of insuring his home. Consequently, the burden shifted to Johnson to show there was a triable issue of material fact.

C. Exclusion of the Birnbaum Declaration

In the trial court, Johnson relied heavily on the Birnbaum expert witness declaration to counter Sun West's and Proctor's evidence and raise a triable issue of fact. After a lengthy exposition of its reliability, however, the trial court excluded the Birnbaum declaration in its entirety. "This declaration is a legal brief," the trial court said. "It is not a proper expert opinion. Its advocacy character means that it's clearly unreliable. On page 12, in the last paragraph of this declaration, Mr. Birnbaum states that he's the executive director of an advocacy organization. I believe he's held this position as leader of an advocacy organization since 1996. He's not neutral or detached. He's a partisan with an agenda, and it shows.

"He's become a team player, if not the team leader, which is the same problem that came up in the *Sargon* case with Mr. Skorheim, who said that a business with . . . little track record was worth a billion dollars, billion with a "b." Pretty much the Supreme Court, like the trial court, laughed that expert out of court.

"I hear Mr. Birnbaum is obviously a highly intelligent and civically concerned individual, but he comes to court with what should be signed as a legal brief."

The trial court went on to detail several specific examples from the declaration to support the finding:

- "For example, Birnbaum adopts contradictory positions. Compare paragraph 13 with paragraph 16. Paragraph 13, he's not challenging Proctor's rates. Paragraph 16,

'Proctor's rates are inflated by kickbacks.' 'Kickbacks' is a pejorative, value-laden term that stems from nowhere else than Mr. Birnbaum's personal distaste for the kind of business arrangement that he apparently is on a crusade to crush."[6]

- "There is value-laden advocacy unconnected to any law. Take a look at paragraph 19. It's not, quote, 'proper,' close quote . . . , to include insurance tracking cost. Proper in whose opinion and by what criterion? Where does this value judgment . . . come from? Wherever it comes from, it

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[6] Paragraph 13: "This case does not challenge, nor does it deal with, rates used by Proctor and Great Lakes Reinsurance (UK) PLC. Rather, this case challenges the LPI [lender-placed insurance] charges by the mortgage servicer Sun West to Class members because those charges included amounts to pay for mortgage servicing activities unrelated to the provision of LPI."

Paragraph 16: "LPI charges to borrowers are inflated beyond the economically reasonable cost of providing LPI because of reverse competition among LPI providers to secure business from mortgage servicers. LPI providers, like Proctor, inflate the LPI premiums charged to servicers—charges which the servicer then assesses mortgage borrowers—in order to pay for kickbacks to the mortgage servicer as consideration for the mortgage servicer steering the LPI business to the LPI provider. These kickbacks take a variety of forms, including the provision of below-cost services unrelated to the provision of LPI by Proctor to Sun West with the cost of the subsidy for these services unrelated to the provision of LPI included in the Sun West LPI charges to Class Members."

doesn't seem to be California law or any other neutral or objective source."[7]

- "Parts of the declaration are simply arbitrary, unverifiable, and unfalsifiable. Take a look at paragraph 21. The $.10 fee is, quote, 'far below Proctor's cost.' How do we know this? Mr. Birnbaum says 'in my experience.' Well, that's a black box. That is the method of 'the Oracle at Delphi.' It's impossible to disprove.[8] [¶] Take a look at paragraph 33.

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[7] Paragraph 19: "The costs of insurance tracking are not properly included in the LPI charges by Sun West to Mr. Johnson and other Class Members. Insurance tracking is [a] portfolio-wide responsibility of the mortgage servicer, Sun West. Even if no borrower failed to maintain LPI, the servicer would still have to perform tracking to ensure required coverage was in place and to be able to disburse premium payments from borrowers' escrow accounts for voluntary insurance when due. Insurance tracking is needed for more than simply identifying lapses in required insurance. It is unfair to charge the relatively small percentage of borrowers who are assessed LPI charges by Sun West all the expenses associated with insurance tracking."

[8] Paragraph 21: "Proctor had two sources of revenue from its agreement with Sun West—LPI premiums and the tracking fee of $0.10 per loan per month. In my experience, the $0.10 fee was far below the cost to Proctor for providing just the insurance tracking, let alone all the outsources services. In fact, Proctor witness Michael Cox testified that several of the outsourced services were not covered by the tracking fee and were, in fact, paid for through amounts included in the LPI premium paid by Sun West to Proctor. Since the only revenue sources for Proctor from Sun West were LPI premium and the $0.10 tracking fee, the subsidy for the below-cost insurance tracking and free services had to be included in inflated LPI premiums to Sun West and,

'I have reviewed over a decade['s] worth of actual [loss] data. These empirical data refute'—where's the cite? This study is apparently unpublished. That paragraph guides us to nowhere else in this stack of papers. What's one to do with an expert opinion like that? That's not an expert's opinion."[9]

- "Some of the declaration is simply nonsensical. Paragraph 34 asserts that lender-placed insurance should be less expensive because there's no underwriting. Well, underwriting is the evaluation of risk. That's, I think, the same thing as saying it's better to buy blindly the next time you make a purchase rather than do any kind of consumer investigation. [¶] Why is that? Because consumer investigation, to make yourself knowledgeable about the marketplace, that just takes a lot of time. It must be a waste of time. So the next time you make a purchase, whether it's a house or car, don't worry about evaluating what you're buying. Save some time. [¶] But nobody in this courtroom is that naïve when it comes to their own

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consequently, in excessive LPI charges by Sun West to Mr. Johnson and other Class Members."

[9] Paragraph 33: "Second, whether LPI coverage is 'riskier' than voluntary insurance coverage is an empirical question that can be tested. I have reviewed over a decade's worth of actual loss data which shows that the average claim per insured property for LPI is lower than the average claim for a homeowner's insurance policy. These empirical data refute the claim of 'greater risk.' "

affairs. There's no evidence that any real-world insurer conducts business that way."[10]

In *Sargon*, the Supreme Court explained the trial court's gatekeeping function related to expert testimony proffered under Evidence Code sections 801 and 802. Evidence Code section 801 limits expert witness opinion testimony to opinion "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." Evidence Code section 802 permits the trial court to examine the "reasons for [the expert's] opinion and the matter . . . upon which it is based . . . ."

Sargon distilled the trial court analysis of an expert's opinion under Evidence Code sections 801 and 802 down to the following: "Evidence Code section 801 governs judicial review of the *type* of matter [upon which an expert witness's testimony is based]; Evidence Code section 802 governs judicial review of the *reasons* for the opinion." (*Sargon*, 55 Cal.4th at p. 771, original italics.) *Sargon* explained that "a court may inquire into[] not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning.

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[10] Paragraph 34: "Third, the absence of individual property underwriting dramatically reduces the expenses for issuing coverage for LPI compared to the costs of underwriting and issuing coverage for a homeowner's insurance policy. Even if LPI was 'riskier'—and the evidence indicates this is not the case—the lower expenses associated with underwriting and issuing LPI may exceed any increased claim expenses."

'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' [Citations.] [¶] Thus, under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony." (*Id.* at pp. 771-772.) The trial court as gatekeeper for expert witness testimony must focus " 'solely on principles and methodology, not on the conclusions that they generate.' " (*Id.* at p. 772.)

The trial court analyzed Birnbaum's declaration according to the boundaries *Sargon* established. The trial court determined both that Birnbaum's testimony was based on matter that was *not* of a type that reasonably may be relied upon by an expert in forming an opinion in this matter, and that the testimony was not supported by the material upon which Birnbaum purported to rely, and sometimes not supported at all by empirical data or analysis. The trial court found it difficult to reconcile various contradictory statements in the declaration, cited at least one legal conclusion in the declaration that was unconnected to any legal basis, cited a portion of the declaration unsupported by any of the material Mr. Birnbaum purported to have relied upon, and identified at least one significant logical flaw in the declaration that considerably undermines one of the major theses of Mr. Birnbaum's declaration.[11] The trial court correctly concerned

[11] Although the trial court's statements at the summary judgment hearing hint at the point, the trial court did not specifically mention Birnbaum's sources. In his briefing here,

itself with the declaration's reliability. We find no abuse of discretion in the trial court's exclusion of the Birnbaum declaration.

D. Johnson failed to show there was a triable issue of material fact

Johnson relied heavily in the trial court on Birnbaum's declaration to raise a triable issue of fact. In the separate statements of undisputed material fact opposing the defendants' motions for summary judgment, Johnson acknowledged repeatedly that he had "no 'independent facts[,]' other than those set forth in the Second Amended Complaint in support of his

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Johnson relies most heavily on a Fannie Mae Request for Proposal for Lender Placed Insurance Tracking Voluntary Insurance Lettering Program dated March 6, 2012, which was attached to Birnbaum's declaration. While we appreciate that Fannie Mae is likely a reliable source for information regarding lender-placed insurance, the document to which Johnson cites and upon which Birnbaum purportedly relied is, on its face, a *procurement* document, and is *not* a report or other statement of results of research or data collection, and does not purport to be anything other than an attempt to secure vendors. "As a best practice," the document says, "Fannie Mae seeks to reduce expenses while improving service quality. After extensive internal review, Fannie Mae believes that current Lender Placed Insurance costs are not market competitive and can be improved through unit price reductions and fee transparency to the benefit of both the taxpayers and homeowners. Therefore, *Fannie Mae is undertaking this competitive procurement process* to improve the pricing and fee transparency for Lender Placed Insurance while maintaining coverage and service quality." Based on the allegations in this case, the Fannie Mae document Johnson so heavily relies upon does not contain the type of matter upon which Birnbaum could have relied to support his opinions.

claims." But, he said, "Plaintiff may rely upon expert testimony to raise a triable issue of fact." The trial court struck Johnson's expert declaration and did not abuse its discretion when it did so. The vague concept that Birnbaum's declaration supported—that the premiums Sun West passed through to Johnson were unreasonably high—has no support in the record. Neither does the law or the record support the inference Johnson asks us to draw that because the premium included a commission it was not an amount "necessary to protect the value of the Property and the Lender's rights in the Property."

Johnson repeatedly returns to the notion that because Sun West pays $0.10 per contract per month for Proctor's tracking services that Sun West's clients must *actually* be paying (through Proctor's commission on the premiums ultimately charged to Sun West's customers) for the costs of all of the services Proctor provides Sun West. Proctor acknowledges that the premium it charged Sun West included a 20.5 percent commission. As the trial court pointed out, however, and as Johnson concedes, nothing in the record suggests that a 20.5 percent commission is unconscionable, out of line with industry standard, not competitive in the relevant marketplace, or somehow improper to pass through. Moreover, we find the argument logically untenable. The only reason Sun West was required to incur the cost of the lender-placed insurance premium—including the 20.5 percent commission—is because Johnson failed to maintain insurance he agreed he would maintain. Johnson's actions made the entire cost of the premium *necessary* for Sun West to incur, and there is no evidence that Sun West profited from Johnson's failure to meet his contractual obligation.

Ultimately, there is no evidence in the record from which we can conclude that the price Johnson paid Sun West for his lender-placed insurance policy was either unreasonable or unnecessary. That leaves each of Johnson's causes of action without either factual or legal support.

DISPOSITION

The trial court's judgment is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.